No. 91-455

Supreme Court, U.S.
FILED
SEP 18 1991
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

---

THE CRUDE COMPANY,
*Petitioner,*

v.

THE UNITED STATES DEPARTMENT OF ENERGY and JAMES D. WATKINS, IN HIS OFFICIAL CAPACITY AS SECRETARY OF ENERGY,
*Respondents.*

---

**Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States**

---

## PETITION FOR A WRIT OF CERTIORARI

---

ROBERT L. WEINBERG
*Counsel of Record*
WILLIAM M. WILTSHIRE
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

RAYMOND J. BATLA, JR.
HOGAN & HARTSON
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600
*Counsel for Petitioner*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTIONS PRESENTED

1. Must a party exhaust its administrative remedies prior to judicial consideration of its constitutional challenge to an agency's authority, when the agency's administrative tribunal has no power to sustain such a challenge?

2. In a federal civil action arising under the Emergency Petroleum Allocation Act, must a substantial constitutional issue raised by the complaint—namely, whether Article III and the Seventh Amendment prohibit administrative adjudication of a "tortious conduct" claim—be certified by the district court to the Temporary Emergency Court of Appeals pursuant to the Act's mandatory provision for certification of substantial constitutional issues to TECA?

3. Does the Department of Energy's administrative adjudication of a monetary claim against a private party for common law "tortious conduct" liability violate Article III and Seventh Amendment guarantees; or does such a proceeding fall within the "public rights" exception to those guarantees?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTES INVOLVED | 2 |
| STATEMENT OF THE CASE | 3 |
| REASONS FOR GRANTING THE WRIT | 9 |
| I. THIS COURT SHOULD RESOLVE THE CONFUSION IN THE CIRCUIT COURTS AS TO WHETHER NON-CONSTITUTIONAL CLAIMS MUST BE EXHAUSTED AT THE ADMINISTRATIVE LEVEL PRIOR TO JUDICIAL CONSIDERATION OF CONSTITUTIONAL ISSUES BEYOND THE ADMINISTRATIVE TRIBUNAL'S POWER TO SUSTAIN | 10 |
| II. THIS COURT SHOULD RESOLVE THE QUESTION OF A DISTRICT COURT'S JURISDICTION TO CONSIDER ANCILLARY NON-CONSTITUTIONAL ISSUES WHEN PRESENTED WITH A SUBSTANTIAL CONSTITUTIONAL CHALLENGE ARISING UNDER THE EPAA | 14 |
| III. DECIDING PETITIONER'S CLAIM WILL ALLOW THE COURT TO SIGNIFICANTLY DEVELOP ITS "PUBLIC RIGHTS" DOCTRINE BY APPLYING ITS DECISION IN *GRANFINANCIERA* IN THE CONTEXT OF AN ADMINISTRATIVE ADJUDICATION | 17 |
| CONCLUSION | 21 |

## TABLE OF AUTHORITIES

FEDERAL CASES — Page

*Andrade v. Lauer*, 729 F.2d 1475 (D.C. Cir. 1984) ... 12
*Atlas Roofing Co. v. OSHA Review Comm'n*, 430 U.S. 442 (1977) ... 19
*Bayport Refining Co.*, 51 FERC ¶ 63,011 (1990) ... 4, 15
*Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, 578 F.2d 1149 (5th Cir. 1978), *cert. denied*, 444 U.S. 879 (1979) ... 10
*Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) ... 18
*Delpit v. DOE*, Civil Action No. 89-0982-SS (D.D.C.) ... 8
*Finnerty v. Cowen*, 508 F.2d 979 (2d Cir. 1974) ... 12
*Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) ... 9, 18-20
*Hastings v. Judicial Conference of the United States*, 770 F.2d 1093 (D.C. Cir. 1985), *cert. denied*, 477 U.S. 904 (1986) ... 11
*Mathews v. Eldridge*, 424 U.S. 319 (1976) ... 13
*Merit Petroleum, Inc.*, 54 FERC ¶ 63,003 (1991) ... 16
*Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856) ... 18
*Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) ... 18-20
*Pel-Star Energy, Inc.*, 52 FERC ¶ 63,006 (1990) ... 16
*Rosenthal & Co. v. Bagley*, 581 F.2d 1258 (7th Cir. 1978) ... 11
*Sauder v. DOE*, 648 F.2d 1341 (TECA 1981) ... 17
*In re Stripper Well Exemption Litigation*, 578 F. Supp. 586 (D. Kan. 1984) ... 15
*T.E. Reserve Corp.*, 21 DOE ¶ 83,005 (1991) ... 16
*Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985) ... 18, 19
*Ticor Title Ins. Co. v. F.T.C.*, 814 F.2d 731 (D.C. Cir. 1987) ... 11, 13
*Weyerhauser Co. v. Marshall*, 592 F.2d 373 (7th Cir. 1979) ... 12

TABLE OF AUTHORITIES—Continued

FEDERAL CONSTITUTION, STATUTES AND REGULATIONS

Page

Article III of the United States Constitution ..... *passim*
Seventh Amendment to the United States Constitution ..... *passim*
10 C.F.R. § 211.66 ..... 5
10 C.F.R. § 211.67 ..... 5
28 U.S.C. § 1254(1) ..... 5
Economic Stabilization Act ("ESA"), 12 U.S.C. § 1904 note (1976 ed.) ..... *passim*
Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. § 754(a) ..... *passim*
Pub. L. No. 92-210, § 2, 85 Stat. 743 (December 22, 1971) ..... 14

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

---

No. ————

---

THE CRUDE COMPANY,
*Petitioner,*

v.

THE UNITED STATES DEPARTMENT OF ENERGY and JAMES D. WATKINS, IN HIS OFFICIAL CAPACITY AS SECRETARY OF ENERGY,
*Respondents.*

---

**Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States**

---

## PETITION FOR A WRIT OF CERTIORARI

---

The Crude Company ("TCC")[1] petitions for a writ of certiorari to review the judgment of the Temporary Emergency Court of Appeals of the United States ("TECA") entered in this case on July 5, 1991, affirming the dismissal of petitioner's declaratory judgment action.

## OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals, not yet officially reported, is unofficially reported

[1] Pursuant to Rule 29.1, TCC states that it has no parent or subsidiary companies.

at 4 Energy Mgmt. (CCH) ¶ 26,653, and is reprinted in the appendix hereto, p. 1a, *infra*. The memorandum decision of the United States District Court for the District of Columbia (Sporkin, J.), not officially reported, is unofficially reported at 4 Energy Mgmt. (CCH) ¶ 26,644. It is reprinted in the appendix hereto, p. 9a, *infra*.

## JURISDICTION

The judgment of the court of appeals was entered on July 5, 1991. (App. 1a.) On July 19, 1991, TCC filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc*. TECA denied this Petition on August 20, 1991. (App. 21a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Section 211(g) of the Economic Stabilization Act ("ESA"), 12 U.S.C. § 1904 note (1976 ed.), as incorporated by the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. § 754(a).

## STATUTES INVOLVED

Section 209 of the ESA, 12 U.S.C. § 1904 note (1976 ed.), as incorporated in the EPAA, 15 U.S.C. § 754(a), provides:

> Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such

> order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

Section 211(c) of the ESA, 12 U.S.C. § 1904 note (1976 ed.), as incorporated in the EPAA, 15 U.S.C. § 754(a), provides:

> In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

## STATEMENT OF THE CASE

On August 10, 1990, petitioner TCC commenced a declaratory judgment action in the United States District Court for the District of Columbia[2] against the United States Department of Energy ("DOE") and the Secretary of Energy. (TECA SR 1-49).[3] TCC sought a declaration that a pending DOE administrative proceeding against TCC was being pursued and conducted in violation of TCC's rights under Article III and the Seventh Amendment of the United States Constitution,

---

[2] The jurisdiction of the district court was invoked under Section 211(a) of the ESA, which vests exclusive original jurisdiction over cases arising under the ESA and EPAA in the district courts of the United States.

[3] "TECA SR" refers to the Stipulated Record filed in the court of appeals.

because DOE was seeking to use its own administrative tribunals to adjudicate the liability of TCC for alleged "tortious conduct" under common law, and for damages allegedly resulting therefrom. TCC brought its constitutional claim to the district court after the Secretary of Energy had officially stated to the Federal Energy Regulatory Commission ("FERC")—in Comments that the Secretary submitted to FERC in another case involving the same constitutional issue—that DOE tribunals do not have the power to sustain a constitutional challenge to their own authority to adjudicate "tortious conduct" claims. (TECA SR 8).[4]

In its Complaint in the declaratory judgment action, TCC alleged that DOE had issued an administrative complaint, or Proposed Remedial Order ("PRO"), pursuant to Section 209 of the ESA; and that this PRO had charged regulatory violations against two respondents: Southwestern Refining Company, Inc. ("SRCI") and TCC. (TECA SR 4). At the time in issue, SRCI was a small refining company; TCC was a crude oil "reseller." The PRO alleged that, during the period of January through May 1977, SRCI had filed reports erroneously claiming "small refiner bias" entitlements[5] for approx-

---

[4] Secretary of Energy's Comments on the Proposed Decision and Order in *Bayport Refining Co.*, 51 FERC ¶ 63,011 (1990). The Secretary there urged the Commission to rule that FERC and its ALJ had no authority to decide the constitutional challenge to the DOE's power to adjudicate the PRO in *Bayport*, because Congress had reserved exclusive power to decide such constitutional challenges to TECA and the Supreme Court. These Comments appear in the record below at TECA SR 24-27, and are quoted in part in note 11, *infra*.

[5] The "entitlements" system was created to equalize the benefits of access to lower-priced domestic crude oil among all segments of the petroleum industry. Each oil refiner was provided with a number of entitlements designed to ensure its right to refine a proportionate share of barrels of the lower-priced oil. Small refiners were allocated additional entitlements, known as the "small refiner bias"

imately 613,000 barrels of crude oil which had been supplied to SRCI by TCC, and which were subsequently processed for SRCI's account during those months by Champlin Petroleum Company ("Champlin"), a major integrated refiner. (TECA SR 4, 398). According to the PRO, TCC and SRCI were jointly and severally liable for $1.2 million, representing the total value of the SRB benefits erroneously claimed by SRCI, plus interest since 1977. (TECA SR 210).

The reporting regulations allegedly violated by SRCI,[6] so as to render it liable for the $1.2 million, did not, by their terms, apply to TCC. TCC was concededly a reseller, while only refiners were required to file with DOE the reports at issue. However, after the original theory pleaded in the PRO—that TCC and SRCI were engaged in a joint venture—had been rebutted by TCC,[7] DOE sought leave from the administrative tribunal (DOE's Office of Hearings and Appeals ("OHA")) to amend the PRO to allege a different theory: that TCC was rendered jointly and severally liable with SRCI by acting as the "animating force" in inducing SRCI to file the allegedly erroneous monthly reports claiming the benefits. (TECA SR 5-6). In support of its motion to amend the PRO, DOE cited to and purported to rely upon a principle "well-settled *in tort law* that a person who induces a second person's tortious conduct is liable to third persons for harm caused by the second person." (TECA SR 6 (emphasis added)). The declaratory judgment complaint also

("SRB"), in order to compensate for their higher operating costs. (App. 10a).

[6] DOE contended that the allegedly erroneous reports filed by SRCI violated 10 C.F.R. §§ 211.66(d), 211.66(h), and 211.67(j), because the crude oil processed for SRCI by Champlin allegedly did not qualify under 10 C.F.R. § 211.67(e)(1) for the additional SRB entitlements.

[7] This allegation was rebutted in TCC's response to the PRO. (TECA SR 5).

alleged that, in recent cases, DOE had frequently sought to impose such "animating force in tortious conduct" liability on respondents in its administrative proceedings. (TECA SR 6).

OHA granted the motion for leave to amend the PRO as requested, by Order dated June 30, 1989. (TECA SR 138-49). In granting the motion, OHA characterized the amended PRO as follows: "Basically, the [DOE] contends that *TCC's own tortious conduct* in making these arrangements made it liable as a 'central figure' and an 'animating force' in the alleged regulatory violations committed by SRCI." (TECA SR 140 (emphasis added)). TCC's declaratory judgment action in the district court challenged the validity of that OHA Order, because the amended PRO had converted the original administrative complaint against TCC into an allegation of liability for common law tort—triable only in an Article III court which would afford the Seventh Amendment right to a jury trial. (TECA SR 6-8).

TCC filed a motion in the district court for the substantial constitutional questions thus raised in the civil action to be certified to TECA for resolution, pursuant to the mandatory certification procedure prescribed by Section 211(c) of the ESA.[8] (TECA SR 50-52). TCC contended in its motion that a substantial constitutional issue was presented by its complaint because DOE's "tortious conduct" liability theory was predicated upon judicially created common law principles of agency and tort, and that DOE was thus improperly seeking to adjudicate a claim for damages at law against TCC. Accordingly, TCC asserted that it had a constitutional right to have

---

[8] Section 211(c) of the ESA, quoted in full in the Statutes Involved section, *supra*, provides in pertinent part that when "the [district] court determines that a substantial constitutional issue exists, the court *shall* certify such issue to the Temporary Emergency Court of Appeals." (Emphasis added.)

such claim tried before an Article III court, having the power to empanel a jury. (TECA SR 53-93).

Defendants DOE and Secretary Watkins opposed the motion for certification of the constitutional issues to TECA. They argued that (1) the "tortious conduct" liability theory seeks the equitable remedy of restitution, and therefore does not implicate the protections of the Seventh Amendment applicable to actions at law; and (2) enforcement of the EPAA vindicates "public" rights, whose adjudication could be and had been delegated to DOE by Congress in Section 209 of the ESA. Defendants also cross-moved for dismissal of the action based on TCC's purported failure to exhaust administrative remedies and their contention that the constitutional claims were not yet ripe for judicial decision. (TECA SR 94-159).

In a Memorandum opinion and order, the district court, per Sporkin, J., (1) denied TCC's Motion for Certification of a Substantial Constitutional Issue; and (2) ordered dismissal of TCC's action, without prejudice. (App. 9a-19a). Both parts of the trial court's order were premised on its conclusion that TCC had failed to exhaust administrative remedies before OHA on its non-constitutional defenses, and that consideration by the district court of the constitutional issues presented for certification to TECA would therefore be premature. The district court did *not* rule upon the merit or substantiality of the constitutional challenge, but denied certification under the statutory procedure solely because of the asserted failure to exhaust administrative remedies. (App. 9a-19a).

TECA affirmed the district court's order of dismissal, holding that TCC's constitutional claims could not be reviewed until TCC had exhausted its administrative remedies. (App. 6a-8a).[9] TECA did not, however, reach the

[9] The TECA panel noted DOE's concession at oral argument that some "unfortunate language" in one of DOE's motions gave the

central jurisdictional issue of whether the district court had exceeded its authority under the certification statute when it dismissed TCC's declaratory judgment action *without* either certifying the constitutional question presented in the Complaint or holding it not to be "substantial." [10] TECA regarded any error in failing to grant certification as "harmless." (App. 4a). Nor did TECA express any opinion on the substantiality of the constitutional challenge raised by TCC. (App. 7a).

---

impression that it was attempting to hold TCC liable based upon common law tort principles. (App. 6a n.2). The record goes considerably beyond this belated concession, for DOE's purportedly "unfortunate language" was not confined to a single motion of a party; rather, it was adopted by OHA in granting leave to amend the PRO itself. OHA took DOE at its word: "Basically, the [DOE] contends that TCC's own tortious conduct in making these arrangements made it liable as a 'central figure' and an 'animating force' in the alleged regulatory violations committed by SRCI." (TECA SR 140). TECA failed to recognize that DOE's self-confessed "unfortunate language" was not only contained in DOE's motion for leave to amend the PRO, but had been accepted by OHA as the basis for granting the motion and for its continued consideration of liability under the amended PRO.

The Order granting leave to proceed administratively on a claim for tort had thereby accomplished an unconstitutional arrogation of power by DOE in violation of petitioner's Article III and Seventh Amendment rights. No further administrative record made on the amended PRO could alter this violation, petitioner contends. Its remedies were exhausted.

[10] Such a holding would have been very unlikely, had the district court addressed the issue, because the same district judge had indicated in another case that a similar Seventh Amendment challenge did present a "serious question." Order of October 3, 1989, entered in *Delpit v. DOE*, Civil Action No. 89-0982-SS (D.D.C.) at p. 2 (quoted at TECA SR 7, 74).

## REASONS FOR GRANTING THE WRIT

Review by this Court is warranted for three reasons. First, there is a great deal of inconsistency and uncertainty in decisions of the circuit courts of appeals as to whether administrative remedies must be exhausted with respect to non-constitutional claims prior to judicial consideration of those collateral constitutional challenges which are beyond the power of the administrative tribunal to sustain. The constitutional issues raised by petitioner are of great importance to the energy enforcement system under the EPAA and affect numerous pending cases; they should be expeditiously and judicially resolved. Second, neither TECA nor this Court has addressed and resolved the important jurisdictional question of a district court's authority—despite the mandatory language of the certification statute—to decide a case solely on ancillary non-constitutional grounds when presented with a substantial constitutional question arising under the EPAA. A definitive determination of this basic procedural and jurisdictional issue is necessary to ensure the integrity of the statutory framework mandated by Congress for exclusive and speedy judicial review by TECA of important constitutional questions, to ensure their prompt and uniform decision. Recent world events have once again demonstrated the continuing threat of a sudden national energy crisis—which would trigger the need for a speedy regulatory response and expeditious handling of the enforcement litigation which its implementation would require. Third, resolution of the merits of petitioner's constitutional challenge to DOE procedures involves the far-reaching question of how this Court's recent decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), should be applied to the rights of parties proceeded against before a whole range of administrative tribunals.

## I. THIS COURT SHOULD RESOLVE THE CONFUSION IN THE CIRCUIT COURTS AS TO WHETHER NON-CONSTITUTIONAL CLAIMS MUST BE EXHAUSTED AT THE ADMINISTRATIVE LEVEL PRIOR TO JUDICIAL CONSIDERATION OF CONSTITUTIONAL ISSUES BEYOND THE ADMINISTRATIVE TRIBUNAL'S POWER TO SUSTAIN.

As the defendant Secretary of Energy stated in his Comments filed with FERC, DOE's tribunals do not have the power to sustain a constitutional challenge to their own jurisdiction; only TECA and the Supreme Court have the authority to pass on such purely legal issues, as they "fall peculiarly within judicial expertise." [11] *Compare Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, 578 F.2d 1149, 1154 (5th Cir. 1978), *cert. denied*, 444 U.S. 879 (1979) (holding that Fifth Circuit could not intrude upon exclusive jurisdiction of TECA and the Supreme Court to consider questions of constitutionality related to the ESA and EPAA). Despite the conceded unavailability of administrative relief for TCC's constitutional challenge to DOE's authority, and the mandatory procedure for certification of such constitutional issues, TECA did not reach the merits of TCC's constitutional challenge to DOE's power to adjudicate "tortious conduct" claims. TECA concluded that, notwithstanding the congressionally prescribed certification procedure, the merits of the challenge could not be reached because TCC had not yet

---

[11] The Secretary's comments in *Bayport* are quoted at TECA SR 216, ("The particular issues presented—the extent to which Article III powers are exclusive and separation of powers generally—fall peculiarly within judicial expertise. . . . *The plain intent of Congress* was that DOE regulations and orders issued thereunder not be stayed or set aside on constitutional grounds by lower federal courts and that *such issues be resolved exclusively by TECA or the Supreme Court.* It is inconceivable that Congress would withhold such powers from the district courts while at the same time intending that FERC, a body lower on the appellate scale than district courts for RO review purposes, would exercise a power to invalidate on such grounds a vital feature of DOE's enforcement program." (Emphasis added.))

exhausted its administrative remedies by obtaining a final OHA decision on its non-constitutional claims.[12] TECA thus held, in effect, that a party may not seek judicial review of a constitutional challenge to an administrative proceeding before exhausting its non-constitutional claims—*even though the administrative tribunal concededly does not have the power to sustain the constitutional challenge.*

The courts of appeals—even within the same circuit—have reached inconsistent and confusing conclusions on the applicability of the exhaustion doctrine to a constitutional claim which the agency has no power to sustain. Some courts have held, as TECA did below, that exhaustion on non-constitutional issues is required prior to judicial consideration of constitutional issues. For example, in *Ticor Title Ins. Co. v. F.T.C.*, 814 F.2d 731, 741 (D.C. Cir. 1987), the court refused to consider a facial constitutional challenge to the statutory delegation of power to the Federal Trade Commission to initiate and prosecute complaints for unfair trade practices, until the agency was given the opportunity to consider and rule on the plaintiff's substantive defenses to the charges. In *Rosenthal & Co. v. Bagley*, 581 F.2d 1258, 1261 (7th Cir. 1978), the court similarly declined to hear a Seventh Amendment challenge to the statutory scheme which empowered the Commodity Futures Trading Commission to adjudicate reparations claims, until administrative review had been exhausted on plaintiff's other contentions. And in *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093 (D.C. Cir. 1985), *cert. denied*, 477 U.S. 904 (1986), the court postponed review of a constitutional challenge to the facial validity of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, until such time as the procedures in that statute had actually been applied to the plaintiff judge.

[12] A party seeking to appeal a final OHA decision must first appeal to FERC, then to the district court, and only after that to TECA. Thus, it would probably be years before TCC's challenge could reach TECA by that route.

Other appellate panels have held that judicial consideration of a party's constitutional claims need not await administrative exhaustion of its non-constitutional claims. For example, *Andrade v. Lauer*, 729 F.2d 1475, 1493 (D.C. Cir. 1984), involved claims raised by former agency employees to the procedures used and authority exercised in a reduction in force ("RIF") at the Department of Justice. The court did not require exhaustion of administrative review of the plaintiffs' challenges to the procedures used in the RIF as a prerequisite to considering plaintiffs' constitutional challenge under the Appointments Clause to the underlying authority exercised by the agency officials who prescribed the RIF. In *Weyerhauser Co. v. Marshall*, 592 F.2d 373, 376 (7th Cir. 1979), the court considered the plaintiff's Fourth Amendment attack on the validity of an administrative inspection warrant, even though plaintiff had not as yet even entered into administrative hearings on the administrative citations which resulted from the allegedly improper search. Similarly, in *Finnerty v. Cowen*, 508 F.2d 979, 982 (2d Cir. 1974), the court considered a constitutional challenge to the administrative procedures employed by the Railroad Retirement Board in reducing the plaintiff's benefits, even though the agency contended that there were "at least two unresolved issues of fact and law central to the appellant's complaint" which the agency had not yet ruled on.

The foregoing groups of decisions are not easily reconciled. Not surprisingly, the uncertainty in this area of the law has been most acutely reflected in opinions of panels of the Court of Appeals for the District of Columbia Circuit, which hears a large portion of the administrative law cases arising in the federal appellate system. In *Ticor*, the court tried to rationalize the conflicting precedents in the circuit, particularly *Andrade* and *Hastings*, *supra*, as follows:

> [T]he instant case does not fit neatly into either the *Hastings* or the *Andrade* model. It is also evident

> that the two cases, though factually distinct, are not easily reconciled. The principle embraced in *Hastings*—that a court should be loath to interrupt ongoing administrative proceedings, even where a constitutional infirmity is alleged—strongly militates against immediate judicial review of appellants' constitutional challenge. The principle embraced in *Andrade*—that courts may waive the exhaustion requirement where a constitutional challenge to the authority of an agency to act is adequately framed for judicial review—militates in favor of the opposite conclusion.

*Ticor*, 814 F.2d at 738 (opinion of Edwards, J.).[13] Thus, despite its special expertise in the area of administrative law, even the D.C. Circuit has not been able to arrive at a consistent approach to this important issue.

If *certiorari* is granted on this issue, petitioner will argue for the following rule: administrative exhaustion of non-constitutional claims should not be required prior to judicial resolution of constitutional claims which (1) present clear questions of law on the existing record; (2) may be resolved without having to reach the substantive, non-constitutional issues before the agency; and (3) involve a continuing agency practice affecting a number of parties. When these factors are present, judicial consideration of a constitutional challenge would not duplicate administrative proceedings, but would best serve the significant public interest shared by all affected parties. Such a rule is consistent with *Mathews v. Eldridge*, 424 U.S. 319 (1976), in which this Court permitted the plaintiff to bring a procedural due process challenge in district court to the procedures used for

[13] In a separate opinion in *Ticor*, Judge Joyce Hens Green noted that "reconciliation of the two [cases is] virtually impossible except on the theory that exhaustion is a flexible concept. Without gainsaying the truth of that observation as a general matter, I believe it offers little guidance to litigants and courts as to how to resolve the next exhaustion case." *Id.* at 756.

terminating Social Security benefits, despite a statute explicitly requiring exhaustion of administrative remedies as a prerequisite to district court jurisdiction.

Until this Court provides an authoritative standard, the lower courts will continue to act on an *ac hoc* basis in deciding whether to entertain constitutional claims raised by administrative litigants who challenge the administrative tribunal's constitutional authority to hear their pending cases; and such litigants will continue to seek judicial determination of these constitutional claims before all administrative proceedings are concluded. By clarifying the rule to be applied, this Court would give much needed guidance to courts and litigants alike; this could both limit the number of litigants seeking judicial resolution of constitutional claims while administrative proceedings are still pending, and assist the lower courts to assess when such claims should be entertained.

## II. THIS COURT SHOULD RESOLVE THE QUESTION OF A DISTRICT COURT'S JURISDICTION TO CONSIDER ANCILLARY NON-CONSTITUTIONAL ISSUES WHEN PRESENTED WITH A SUBSTANTIAL CONSTITUTIONAL CHALLENGE ARISING UNDER THE EPAA.

Although the statutory provision for certification to TECA of substantial constitutional questions in the energy field was enacted almost 20 years ago,[14] neither TECA nor this Court has ever directly addressed and resolved the issue of whether a district court is permitted by Section 211(c) of the statute to decide the case on the basis of ancillary non-constitutional issues presented in connection with a substantial constitutional question; or whether the district court is required by the terms of Section 211(c) to certify the substantial constitutional

[14] Pub. L. No. 92-210, § 2, 85 Stat. 743, 749 (December 22, 1971).

Moreover, so far as petitioner is aware, there is no case decided by TECA upon which this Court has ever granted *certiorari*.

issue to TECA (leaving it to TECA to decide the further course of any proceedings in the district court).

The certification procedure at issue appears to be *mandatory* under the plain language of the judicial review provisions prescribed by Congress in the ESA and EPAA. *See In re Stripper Well Exemption Litigation*, 578 F. Supp. 586, 600 (D. Kan. 1984) ("If *any* substantial constitutional issue exists, it *must* be certified to TECA."); note 8, *supra*. This certification procedure is an integral part of the overall congressional scheme designed to ensure uniform and prompt decisions in cases involving significant constitutional challenges whose resolution is essential to the smooth functioning of the emergency economic program of price and allocation regulation that Congress adopted in the ESA, and expanded in the EPAA. Petitioner respectfully submits that the certification statute's purpose would be frustrated if district courts were able to pretermit review by TECA of important constitutional issues based on their own determination of ancillary issues.

Petitioner's case illustrates the type of constitutional claim which warrants certification to TECA for prompt and definitive resolution. DOE has continued to issue PRO's based on alleged "tortious conduct" violations, and continues at present to adjudicate liability based on this tort law theory. (TECA SR 6). A number of respondents before DOE tribunals have sought to raise constitutional challenges (similar to petitioner's) to the administrative adjudication of such tort-based claims. Such a constitutional challenge was sustained in a Decision and Proposed Order handed down by an administrative law judge at the Federal Energy Regulatory Commission in *Bayport Refining Co.*, 51 FERC ¶ 63,011 (1990).[15] Two other

[15] As noted above, the Secretary of Energy thereafter urged the Commission to rule that FERC and its ALJ had no authority to decide the constitutional challenge to DOE's power to adjudicate the PRO in *Bayport*. *See* note 11, *supra*.

ALJ's at FERC have expressly disagreed with the ruling in *Bayport*, and have rejected this constitutional challenge. *Pel-Star Energy, Inc.*, 52 FERC ¶ 63,006 (1990); *Merit Petroleum, Inc.*, 54 FERC ¶ 63,003 (1991). Although *Bayport* has been pending before FERC for well over a year since the issuance of the ALJ's opinion and the Secretary's Comments thereon, FERC has not yet adopted, rejected, or modified any of these proposed ALJ decisions, nor scheduled any hearing or proceeding to consider or act upon them. Resolution of the instant case on the merits would presumably control their outcome.

The above-noted conflict between DOE's own administrative tribunals clearly indicates the substantiality of the constitutional issue involved.[16] Challenges to DOE's authority to adjudicate claims of "tortious conduct" liability will continue to recur until the constitutional issue is definitively resolved, and the final resolution will determine the rights of many litigants currently before DOE tribunals. Resolution in favor of petitioner's position would nullify any administrative proceedings being conducted, or to be conducted, in derogation of Article III and Seventh Amendment rights. DOE, as much as any respondent involved in a DOE enforcement proceeding, therefore needs and should have a clear and final resolution of this complex jurisdictional and constitutional question, in order to know in what forum it should prosecute its claims.[17] Only TECA or this Court can provide such

---

[16] Another DOE tribunal went out of its way to consider (and reject) the constitutional-jurisdictional challenge "[i]n view of these conflicting opinions and because challenges to our jurisdiction are a serious matter." *T.E. Reserve Corp.*, 21 DOE ¶ 83,005 at 86,129 (1991).

[17] DOE has the option to proceed in district court or administratively.

DOE brought its claim against TCC pursuant to Section 209 of the ESA (set forth in full at pp. 2-3, *supra*). Section 209 by its terms empowers DOE to bring an action against any individual or organization that has engaged in any acts or practices constituting a violation of any regulation, for restitution of moneys

a resolution; and until that occurs, DOE's system for administrative adjudication will continue to face constitutional challenges which its own Secretary asserts are beyond its power to sustain but which, if later sustained, would invalidate any administrative determinations of tortious conduct liability.

The language of the certification statute clearly calls for certification of substantial constitutional issues to TECA. Petitioner respectfully submits that a district court's review of such an issue is appropriately limited to an evaluation of the substantiality of the constitutional issue, without consideration of any accompanying non-constitutional issues or defenses. This Court should consider and resolve this important issue of statutory interpretation of Section 211(c) in order to ensure that TECA's exclusive original jurisdiction to determine substantial constitutional questions—such as the important Seventh Amendment and Article III issues raised by TCC's declaratory judgment action—is not pretermitted at the district court level.

## III. DECIDING PETITIONER'S CLAIM WILL ALLOW THE COURT TO SIGNIFICANTLY DEVELOP ITS "PUBLIC RIGHTS" DOCTRINE BY APPLYING ITS DECISION IN *GRANFINANCIERA* IN THE CONTEXT OF AN ADMINISTRATIVE ADJUDICATION.

Petitioner's constitutional challenge to administrative adjudication of "tortious conduct" liability involves an emerging area of concern and controversy in recent decisions of this Court: determining the extent of Congress' power to delegate authority to non-Article III tribunals to try common law causes of action to which a

---

received in violation of that regulation, in the appropriate *district court of the United States*. TECA has held that Section 209's grant of authority to DOE to seek remedies in district court also impliedly allows DOE to proceed in administrative tribunals. *Sauder v. DOE*, 648 F.2d 1341, 1348-49 (TECA 1981).

Seventh Amendment right to jury trial would otherwise attach.[18]

Defendants in the instant case argued that, contrary to petitioner's constitutional claim, neither Article III nor the Seventh Amendment precluded administrative adjudication by DOE of its tort claim against TCC. Defendants contended that those constitutional provisions were inapplicable because Congress could (and in Section 209 did) authorize administrative adjudication for an action seeking to vindicate a "public right" to recover SRB benefits erroneously awarded to SRCI. (TECA SR 126-34). Petitioner joined issue on this point; but the district court erroneously failed to certify this substantial constitutional issue to TECA for resolution as the certification statute required. The constitutional issue is ripe for consideration at this juncture—at least to resolve whether it is "substantial." [19]

This Court long ago recognized that Article III does not bar Congress from assigning claims involving "public rights" to non-Article III adjudication. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). More recently, this Court held that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury

---

[18] *See, e.g., Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

[19] Petitioner is asking this Court to hold that TECA erred by failing to order the district court to certify the constitutional issue to TECA, pursuant to the certification statute, Section 211(c) of the ESA. In order to secure such a ruling here, petitioner must satisfy this Court that the constitutional issue satisfies the statutory criterion of being "substantial."

trial is to be 'preserved' in 'suits at common law.'" *Atlas Roofing Co. v. OSHA Review Comm'n*, 430 U.S. 442, 455 (1977).

But distinguishing between "public rights" and "private rights" can be very problematic.[20] As pointed out by members of this Court itself, "[t]he distinction between public rights and private rights has not been definitively explained in [Supreme Court] precedents." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982) (plurality opinion of Brennan, J.).

The doctrine of "public rights" does not provide Congress carte blanche in delegating to a non-jury tribunal the adjudication of "private rights" purportedly related to a public regulatory scheme.

> Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabelling the cause of action to which it attaches and *placing exclusive jurisdiction in an administrative agency* or a specialized court of equity.

*Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 61 (1989) (emphasis added).[21] Petitioner's constitutional claim that

---

[20] For example, the presence of the government as a party (as here) is neither necessary nor sufficient to establish that a public right is involved in a case. *See Thomas*, 473 U.S. at 586.

[21] For example, although the restructuring of debtor-creditor relations may involve a "public right," this Court has twice held that Congress' plenary grant to the Bankruptcy Court of jurisdiction over all claims arising under or related to Title 11 improperly deprived litigants of their rights to have common law claims tried in an Article III court able to empanel a jury. *See Granfinanciera*, 492 U.S. at 56 (Seventh Amendment right to jury trial applicable to fraudulent conveyance claims made by a trustee in bankruptcy); *Northern Pipeline*, 458 U.S. at 72 (plurality opinion) (breach of contract claim is a "private right" which does not become "public" when brought by a debtor in bankruptcy). Moreover, "it is also clear that even with respect to matters that arguably fall within

DOE does not have the power to adjudicate "tortious conduct" claims administratively[22] calls for this Court to determine whether Congress violated that proscription of *Granfinanciera* in the regulatory scheme invoked against petitioner. A decision by this Court on petitioner's constitutional claim would provide important guidance to the lower courts on the application of the "public rights" doctrine in determining the Article III and Seventh Amendment rights of administrative litigants.

---

the scope of the 'public rights' doctrine, the presumption is in favor of Art. III courts." *Northern Pipeline*, 458 U.S. at 70 n.23.

[22] DOE's administrative claim is *not* one seeking equitable restitution from TCC for the refund of monies improperly received by TCC, but rather is one for damages for allegedly tortious conduct. Nowhere did DOE allege that TCC received the $1.2 million of which DOE purportedly seeks restitution; indeed, the PRO made no allegation as to the amount of profit received by TCC from the allegedly improper SRB benefits. DOE presumably believes that portions of the $1.2 million in benefits would have been received by each of the three parties to the processing transaction: the larger refiner Champlin, thhe small refiner SRCI, and the crude oil supplier TCC. By seeking to impose on TCC joint and several liability for the entire $1.2 million, not just for some unspecified portion of the $1.2 million whose economic benefit went to TCC, DOE is seeking to hold TCC liable in damages for the entire $1.2 million because of TCC's alleged tortious conduct, and is not seeking restitution (or disgorgement) of only those benefits received by TCC. Plainly, what DOE is seeking from TCC is monetary *damages*, not equitable restitution. An action seeking monetary damages is presumptively one at law, to which the right to jury trial attaches. *Granfinanciera*, 492 U.S. at 47-48.

## CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

ROBERT L. WEINBERG
*Counsel of Record*
WILLIAM M. WILTSHIRE
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

RAYMOND J. BATLA, JR.
HOGAN & HARTSON
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600
*Counsel for Petitioner*

September 18, 1991

# APPENDIX

## APPENDIX


| | Page |
|---|---|
| Opinion of the Court of Appeals | 1a |
| Memorandum Opinion and Order of the District Court | 9a |
| Order of the Court of Appeals Denying Rehearing and Rehearing *En Banc* | 21a |

## APPENDIX

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

---

No. DC-115

THE CRUDE COMPANY,
*Plaintiff-Appellant*,

v.

UNITED STATES DEPARTMENT OF ENERGY; and
JAMES D. WATKINS, in his official capacity
as Secretary of Energy,
*Defendants-Appellees*.

---

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 90-1909 SS)

(Argued April 26, 1991 Decided July 5, 1991)

ROBERT L. WEINBERG, Williams & Connolly, Washington, D.C., with whom William M. Wiltshire, of the same firm, and Raymond J. Batla, Jr., Hogan & Hartson, Washington, D.C., were on the brief for Plaintiff-Appellant.

JOSEPH W. LOBUE, U.S. Department of Justice, Washington, D.C., with whom Thomas W. Millet, Dennis G. Linder, Jay B. Stevens, and Stuart M. Gerson, of the same agency, were on the brief for Defendant-Appellee.

Before CHRISTENSEN, DAUGHERTY, and BROWN, Judges.

BROWN, Judge:

In this case, plaintiff-appellant The Crude Company ("TCC") asks us to determine whether the district court erred by denying TCC's motion to certify a constitutional issue to this court under Section 211(c) of the Economic Stabilization Act ("ESA"), 12 U.S.C. § 1904 note.[1] Section 211(c) provides in part that in any action commenced under the ESA in any district court of the United States "in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals." The district court here did not determine whether the plaintiff had raised a substantial constitutional issue, finding instead that the action was premature because appellant had not exhausted its administrative remedies within the Department of Energy. Consequently, the district court dismissed the action without prejudice.

I. *Issues on Appeal.*

Appellant raises two issues on appeal. First, TCC argues that under § 211(c) the district court's authority was limited to certifying the constitutional issue to this court. TCC believes that § 211(c) did not permit the district court to refuse certification on the grounds that TCC had not exhausted its administrative remedies. Second, TCC contends that even if the exhaustion doctrine could be properly considered, it should not have barred certification of the constitutional issues in this case. We find that the merits of the plaintiffs' constitutional arguments are not ripe for judicial review because TCC has not exhausted its administrative remedies. We therefore affirm the judgment of the district court.

---

[1] Jurisdiction is founded upon § 211(c) of the ESA, which is incorporated by reference in 15 U.S.C. § 754(a) of the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. § 751 *et seq.*

II. *Case History.*

In December of 1986, the enforcement section of the Department of Energy issued a Proposed Remedial Order ("PRO") against appellant and a company called Southwestern Refining Company, Inc. ("SRCI"). The PRO alleged that in 1977 SRCI erroneously claimed small refiner bias entitlements under allocation and price regulations issued pursuant to the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 *et seq.* The proposed order concerned 613,270 barrels of oil processed in 1977 under an agreement between SRCI and appellant. According to the PRO, under this agreement appellant purported to transfer legal title to this oil to SRCI, although in fact appellant retained all incidents of ownership over the oil. SRCI's only function was to file forms with the DOE showing that it had processed the inflated amount of oil reflected in the arrangement with TCC. The PRO asserted that through this scheme, SRCI was able to improperly obtain small refiner bias entitlements which it provided to appellant to sell.

The PRO initially alleged that appellant was liable on the basis that it was engaged in a joint venture with SRCI. After appellant asserted that the elements of a joint venture had not been shown, the PRO was amended to allege that TCC was an "animating force" in the filing of erroneous Refiner Monthly Reports by SRCI and, as such, was liable for violating the regulations. Subsequent to the amendment just described, appellant brought an action in the U.S. District Court seeking a judgment declaring that the administrative action against TCC violated Article III and the Seventh Amendment to the Constitution. Appellant asserted that the DOE's "animating force" theory was based upon common law principles of tort and agency law which could only be adjudicated by an Article III tribunal. Appellant maintained that it had a right to a jury trial on the issues raised because DOE was in fact seeking money damages for appellant's alleged violations.

Appellant filed a motion to have these constitutional issues certified to the Temporary Emergency Court of Appeals pursuant to § 211(c) of the ESA. The district court denied the motion, characterizing it as an attempt to bypass the administrative process. The court noted that the ESA provided for judicial review after a final agency determination. The court observed that appellant could request clarification of any constitutional issues to TECA at that time and concluded that the general rule requiring exhaustion of administrative remedies prior to judicial review prevented consideration of the constitutional questions.

III. *Discussion.*

It is unnecessary in this case for us to determine whether the district court exceeded its authority under § 211(c). Even if the district court was without authority under that statute to consider the exhaustion doctrine, this court undoubtedly has the authority to do so. Because we find that appellant's claims are not ripe for judicial determination and that any ruling on the merits of the constitutional issues must wait until after the administrative process has been exhausted, we regard as harmless any error on the part of the district court in refusing to certify the issues to this court.

The doctrine of exhaustion of administrative remedies has been consistently applied in cases arising under the EPAA. *MGPC, Inc. v. Department of Energy*, 673 F.2d 1277, 1283 (Temp.Emer.Ct.App. 1982). The doctrine is generally summarized as follows: "In the absence of exceptional circumstances . . . a party may not maintain judicial action to secure relief from a supposed or threatened injury by administrative action until the available and prescribed remedies have been exhausted." *Missouri Terminal Oil Co. v. Edwards*, 659 F.2d 139, 145 (Temp.Emer.Ct.App. 1981) (citing *Hawthorne Oil & Gas Corporation v. Department of Energy*, 647 F.2d 1107,

1113 (Temp.Emer.Ct.App. 1981)). In *McKart v. United States*, 395 U.S. 185, 193-95, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969), the Supreme Court counseled against the premature interruption of the administrative process. The Court explained that the agency is created for the purpose of applying a statute in the first instance and should normally be allowed to develop the factual record and apply its discretion or expertise. *Id.* at 194. It is generally more efficient to allow the administrative process to go forward than it is to allow the parties to seek aid from the courts at various intermediate stages. *Id.* Premature intervention by the courts also raises concerns regarding separation of powers since the agency is created by Congress and vested with authority to exercise its discretion. Also, judicial review will be hindered when (as in this case) the litigant has not allowed the agency to develop the record to show the reasons for the agency's action. Moreover, practical notions of judicial efficiency come into play as well. A party may be successful in vindicating his rights through the administrative process, making it unnecessary for the court to intervene. *Id.* at 195. Exhaustion of administrative remedies allows the agency a chance to discover and correct its own errors. Finally, routine bypassing of the administrative process could weaken the agency and encourage people to ignore its procedures. *Id.*

Appellant contends that judicial review is nevertheless warranted here because Congress intended § 211(c) to be used as a vehicle for the swift resolution of disputed constitutional issues. Appellant is correct in asserting that the judicial review provisions of the ESA were designed to ensure prompt and consistent decisions. Section 211(c) in fact promotes these interests by having TECA, rather than the district court, determine the merits of constitutional claims in the first instance. We see nothing in the language or history of § 211(c), however, to suggest that Congress intended this provision to override the well-established doctrine of exhaustion of administrative

remedies or the fundamental policy that federal courts will not exercise the judicial power when presented with a case in which the issues are not ripe for determination.

It is clear that the exhaustion requirement should be applied in this case. All of the interests identified by the Supreme Court in *McKart* would be served by exhaustion of the administrative process. We would undermine the very purpose of the administrative process if we were to intervene before the agency has made an initial determination as to appellant's comportment with DOE regulations. Although appellant contends that DOE is attempting to hold it liable on a common law theory not authorized by the regulations, the DOE asserts that it is only proceeding on the theory that appellant directly violated the mandatory petroleum price regulation.[2] At this point, we can only speculate as to whether appellant will ultimately be found liable by OHA and, if so, upon what basis. It would be unwise, if not impossible, to determine the merits of a controversy that has not yet crystallized and that may in fact be resolved through the administrative process. *Cf. Abbott Laboratories v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967) ("Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an ad-

---

[2] The DOE states in its brief that the conduct of TCC violated 10 C.F.R. § 205.202, which provides: "Any practice that circumvents or contravenes or results in a circumvention or contravention of the requirements of any provision of this chapter or any order issued pursuant thereto is a violation of the DOE regulations stated in this chapter."

The DOE conceded at oral argument that some "unfortunate language" in one of its motions gave the impression that it was attempting to hold TCC liable based upon common law tort principles. DOE states that this is not the case, however.

ministrative decision has been formalized and its effects felt in a concrete way by the challenging parties.") Concerns over premature judicial action are even more acute when a litigant seeks to raise constitutional issues. It is a fundamental principle of constitutional adjudication that courts should reach constitutional issues only when they cannot avoid doing so. *Atlantic Richfield Co. v. Department of Energy*, 683 F.2d 410, 412 (Temp.Emer. Ct. App. 1980). This "rule of restraint" is appropriately applied in the instant case because appellant's constitutional arguments presuppose the factual and legal basis of a DOE determination that has yet to be made.

Although the courts have recognized numerous exceptions to the exhaustion requirement, we find no circumstances here that would warrant bypassing the administrative process. We cannot agree with appellant that it would be futile to pursue administrative remedies. Appellant may prevail within the agency on its argument that its conduct did not violate the regulation. Appellant can assert in the administrative proceeding the argument that TCC was not subject to the regulations in question. The issues pressed by appellant here, however, do not require judicial action unless and until DOE finds appellant to be liable and appellant exhausts the procedures set up for review of agency decisions. Appellant also contends that exhaustion should not be required because DOE's assertion of jurisdiction violates a clear constitutional directive. As yet, however, the agency has made no determination of the facts and circumstances that it contends demonstrate a violation of the regulations by TCC. It has made no ruling as to the manner in which TCC may have violated the regulations nor has it determined an appropriate remedy for the alleged violations. In sum, the record is too inadequate for this court to make any determination with regard to the constitutional arguments presented by appellant. *See City of New York v. New York Telephone Company*, 468 F.2d

1401, 1403 (Temp.Emer.Ct.App. 1972) ("Judicial review is surely hindered by the failure of the litigant to give the agency an opportunity to make a factual record, exercise its discretion or apply its expertise.")

IV. *Conclusion.*

The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

---

Civil Action No. 90-1909

(Stanley Sporkin)

THE CRUDE COMPANY,
*Plaintiff*,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*,
*Defendant*.

---

MEMORANDUM

[Filed Jan. 14, 1991]

This is a declaratory judgment action brought by plaintiff, The Crude Company ("TCC") against the Economic Regulatory Administration ("ERA"), the prosecuting arm of the Department of Energy. ("DOE"). On December 15, 1986, the ERA issued a Proposed Remedial Order against TCC and another party, Southwestern Refining Company, Inc. ("SCRI"), alleging violations of the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. § 754 (a). That administrative case is currently pending before the DOE Office of Hearings and Appeals. Plaintiff contends that the Proposed Remedial Order is based on a common law tort theory and, as such, Article III, § 1 of the United States Constitution prohibits DOE from proceeding against plaintiff before an administrative tribunal and that the Seventh Amendment entitles plaintiff to a jury trial before an Article III court.

Defendant has moved to dismiss plaintiff's action on the grounds that plaintiff's complaint fails to state a claim upon which relief can be granted and that plaintiff's claims are not ripe for judicial review because the administrative remedies have not been exhausted. Plaintiff opposes defendant's motion and has moved for certification of the constitutional issues in this case to the Temporary Emergency Court of Appeals ("TECA"). Because this Court finds that plaintiff has not exhausted its administrative remedies, the case will be dismissed without prejudice.

*Background*

The EPAA, 15 U.S.C. § 754(a), authorized the President to establish mandatory allocation and price control for crude oil and certain other refined petroleum products, to ensure the fair and complete distribution of such products at equitable prices during the nationwide shortage that developed in the early 1970's. The President was authorized "to prevent any person from taking any action which would be inconsistent with such objectives." 15 U.S.C. § 753 (c)(3).

DOE had primary responsibility for administering and enforcing the allocation and price regulations pertaining to petroleum resources. A system of maximum prices was established. In addition, a system of "entitlements" was introduced to allocate equitably the lower priced domestic crude oil among the various segments of the petroleum industry. Each oil refiner was provided with a number of entitlements designed to ensure a proportionate share of the lower priced oil. Small refiners were allocated additional "small refiner bias" entitlements to compensate for their higher operating costs. If a refiner obtained more oil in a given month than the amount it was entitled to, it had to purchase additional entitlements equivalent to the excess. Similarly, if a refiner obtained less oil than it was entitled to, it had to sell its additional

entitlements. The system operated through monthly reporting by the refiners to the DOE.

Section 503 (a) of the Department of Energy Organizaiton Act, 42 U.S.C. § 7193 (a), authorizes the Secretary of DOE to issue a Remedial Order whenever he believes that a person has violated an EPAA regulation. Under the EPAA, the DOE may seek injunctive relief and the restitution of money from those who violate the laws it administers.[1] Although the EPAA was abrogated by Executive Order of President Reagan, Exec. Order 12287, 46 Fed. Reg. 9909 (Jan. 30, 1981), DOE, through its enforcement arm, the ERA, retains the power to prosecute violations of EPAA regulations which occurred before 1981.

An administrative enforcement proceeding is initiated by the ERA through the issuance of a Proposed Remedial Order setting forth the proposed findings of fact and conclusions of law upon which the action is based. The Proposed Remedial Order serves as the administrative complaint throughout the entire proceeding. If the individual named in the Order decides to contest the matter, a hearing is held before the Office of Hearings and Appeals, the DOE adjudicatory body. If the Office of Hearings and Appeals determines that a violation of the regulations has occurred, it issues a Remedial Order. Review of such an order must be pursued before the Federal Energy Regulatory Commission, which may affirm, modify or vacate the Order or direct other appropriate relief. The Commission's decision constitutes "final agency action" for purposes of judicial review, 42 U.S.C. § 7193 (c). It may be reviewed by a federal district court.

On December 15, 1986, the ERA issued a Proposed Remedial Order against SRCI, a small refiner, and plain-

---

[1] Pub. L. 91-379, 84 Stat. 799 (Aug. 15, 1970), as amended by Pub. L. 92-210, 85 Stat. 743 (Dec. 22, 1971) (previously contained in 12 U.S.C. § 1904 note).

tiff TCC, a reseller of crude oil. The Proposed Remedial Order alleged that SRCI improperly claimed small refiner bias entitlements concerning 613,270 barrels of crude oil processed between January and May, 1977, pursuant to a January 1, 1977 agreement between TCC and SRCI. The Order asserted that, under this agreement, TCC purportedly transferred legal title of certain oil to SRCI, although TCC reserved all of the normal incidents of ownership of the oil, including the administration of the refining process. SRCI's only function, according to the Proposed Remedial Order, was to file forms with DOE presenting the inflated amount of processed oil reflected in the arrangement with TCC. It is alleged that, under this scheme, SRCI was able to improperly obtain small refiner bias entitlements which it provided to TCC to sell.

TCC was named in the Proposed Remedial Order on the basis that the two companies were engaged in a "joint venture," and were therefore jointly and severally liable. On June 11, 1987, TCC filed its objections to the Proposed Remedial Order on the basis that there were insufficient factual allegations to prove a joint venture.

On August 17, 1987, the ERA requested leave to amend the Proposed Remedial Order to allege a new theory for holding TCC jointly and severally liable and to delete the "joint venture" allegation. On June 30, 1989, the Office of Hearings and Appeals gave ERA leave to amend the Proposed Remedial Order to include the allegation that TCC was an "animating force in the filing of erroneous Refiner Monthly Reports by SRCI" and, as such, violated the EPAA.

TCC contends that DOE's "animating force" doctrine is based upon common law principles of tort and agency law that permit the holding of parties jointly and severally liable for directing others' violations of a statute. Citing *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), plaintiff argues that

only an Article III court has jurisdiction to hear an action based on such "tortious" conduct liability.

Plaintiff contends that the ERA's case against TCC implicates legal rather than equitable rights and therefore triggers the Seventh Amendment's provision for a jury trial for common law actions. Suits at common law have consistently been interpreted as those in which legal rather than equitable rights are at issue. *Granfinanciera, S.A. v. Nordberg*, 109 S.Ct. 2782, 2790 (1989). Plaintiff argues that the Proposed Remedial Order against it implicates legal rights because it is based upon traditional common law tort and agency principles. Plaintiff contends that even though the ERA has labelled the damages it seeks "restitutionary," the Proposed Remedial Order in fact seeks traditional common law money damages, which gives TCC the right to demand a jury trial.

Plaintiff ostensibly seeks a declaratory judgment that the ERA's administrative action against it violates the Constitution. Because TECA, a temporary emergency court of appeals which was designed by Congress in the 1970's to deal with constitutional and legal questions arising out of the Economic Stabilization Act and the EPAA, has jurisdiction over matters such as these, the relief TCC seeks is to have this Court certify this case to TECA for determination. Indeed, plaintiff has specifically requested that this Court certify the issues to TECA. The EPAA requires a district court to certify to TECA substantial constitutional issues arising under the EPAA. Section 5(a) of the EPAA incorporates the provisions for judicial review established in the Economic Stabilization Act of 1970, reproduced at 12 U.S.C. § 1904 note (1976 ed.). Section 211 (c) of the Economic Stabilization Act as incorporated in the EPAA provides:

> In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue

> exists, the court shall certify such issue to the Temporary Emergency Court of Appeals . . . . which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

Plaintiff concedes that its sole reason for invoking the jurisdiction of this Court was to have this Court determine whether the constitutional issues raised by the Proposed Remedial Order are "substantial" enough to certify to TECA. Plaintiff, of course, believes that the Court should so find and accordingly should certify the case.

Such a determination depends on a finding that the issues have merit and have not been clearly foreclosed by binding precedent. *Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, 578 F.2d 1149, 1154 (5th Cir. 1978), *cert. denied*, 444 U.S. 879 (1979); *Independent Gasoline Marketers Council v. DOE*, 511 F. Supp. 595, 599 (D.D.C. 1981). If the district court determines that the issues presented are, in fact, substantial, it is required under the statute to certify those issues to TECA.

By bringing this action, plaintiff seeks to short circuit the normal review procedure applicable in cases of this type. The normal process is that once a final agency decision has been rendered, plaintiff has the right to seek judicial review in the district court. At that point, any substantial constitutional question must be certified to TECA. It is thus abundantly evident that the present action before this Court is an attempt by plaintiff to bypass the administrative process and accelerate its access to TECA.

It is clear that Congress did not establish the TECA review procedure to operate in this manner, where the district court does nothing more than act as an "elevator oeprator" to take plaintiff's case from the 2nd to the 5th floor of the courthouse where TECA sits. TCC is attempting to invoke this Court's jurisdiction without presenting

any actual case or controversy for this Court to determine. Rather, plaintiff asks this Court to do nothing more than expedite the procedure by which plaintiff may invoke the jurisdiction of another tribunal.

Even if plaintiff's use of this Court's jurisdiction were sanctioned as TCC suggests, this action must be dismissed as premature for plaintiff's failure to exhaust its administrative remedies. This doctrine has important policy implications underlying its invocation. Its purpose is to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbot Laboratories, Inc. v. Gardner*, 387 136, 148-9 (1967).

While it is undisputed that no final decision has been rendered by DOE concerning the merits of ERA' claims against TCC, plaintiff contends that its claims are nonetheless subject to immediate judicial review because they have raised a constitutional question and further administrative determinations have no role to play in the outcome of that issue. Plaintiff attempts to construe its claim as one where the issue is whether it is proper "to fasten the administrative procedure onto the litigant." *Public Utilities Comm'n v. United States*, 355 U.S. 534, 540 (1958). Quoting *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 580 (1985). Plaintiff argues that a party "may object to proceeding further with [a] lawsuit on the grounds that . . . . it may be resolved only by an agency which exercises '[t]he judicial power of the United States' described by Article III of the Constitution." (Quoting opinion of Justice Rehnquist in *Northern Pipeline*, 458 U.S. at 89).

Plaintiff does not, however, object to the Office of Hearings and Appeals proceeding with the administrative case. In fact, plaintiff argues that the constitutional

question it has raised is wholly separate from the factual and legal defenses it is presenting in the onging administrative proceeding. Indeed, TCC has not asked that proceeding be stayed pending the outcome of this case. Plaintiff's sole contention is that because the DOE's administrative tribunal lacks the authority to review the constitutionality of DOE's regulations,[2] and because the administrative proceeding will deal solely with TCC's nonconstitutional defenses, there is no reason that TCC should be forced to exhaust its administrative remedies on the nonconstitutional issues before this Court can hear its constitutional claims.

Plaintiff's innovative attempt to circumvent the administrative process is flawed. TCC's contention that the prosecution of the Proposed Remedial Order violates the Constitution rests on its position that the Order relies on a common law cause of action. The ERA flatly disputes this. Its position is that TCC is being held liable as the central figure in a direct violation of the EPAA, and that TCC's liability does not hinge on a common law tort theory. Because to date there has been no finding by the Office of Hearings and Appeals, it is not yet clear under which theory plaintiff's liability will be adjudicated. As defendant has argued:

> Resolution of that issue depends upon an essentially factual inquiry into the precise relationship between plaintiff and Southwestern Refining Company, and the extent to which plaintiff was responsible for causing falsified refiner reports to be filed.[3]

Plaintiff's contention is that TCC has *not* actually violated the EPAA and the applicable regulatory require-

---

[2] *See* Comments of the Secretary of Energy on Decision and Proposed Order filed on May 30, 1990, at page 12, in *Bayport Refining Co. and Malcom M. Turner*, 51 FERC ¶ 63,0111 (1990).

[3] Memorandum in Opposition to Plaintiff's Motion For Leave to File Post-Hearing Memorandum at 2.

ments and therefore, the only grounds for liability would be premised upon a common law theory. According to defendant, plaintiff has *directly* violated the statutory and regulatory proscriptions. In other words, a party such as TCC may be held responsible under the EPAA even if that party is not a refiner, so long as it is a central figure in the refining process.

A factual finding by the Office of Hearings and Appeals is necessary to resolve whether TCC is being held liable on a common law or statutory basis. It is not clear how the regulations are to be applied. In *Hastings v. Judicial Conference of United States*, 770 F.2d 1093, 1099-1101 (D.C. Cir. 1985), *cert. denied*, 477 U.S. 904 (1986), the court explained that a district court is ill-equipped to judge the facial validity of a statutory mechanism to be applied by an administrative body before that mechanism has been pursued. The court reasoned that until the statutory process has been played out, it is not clear what the precise powers to be exercised in that process will be.

Plaintiff also argues that the administrative proceeding is a common law tort action because ERA is seeking damages rather than restitution. ERA has argued that its administrative proceeding against TCC is premised on DOE's administrative authority to seek restitution of monies received in violation of the statutes and regulations, and that it is, in fact, seeking restitution for a direct violation of the statute. This issue is clearly not ready for resolution at this time. No monies have been awarded, and no record has been developed. Thus, it is not yet clear what award, if any, will actually be made in the administrative case or what the legal character of such an award will be. This Court has previously held that even where there was a possibility of a damage award, there was no reason to disturb the administrative proceeding on Seventh Amendment grounds until such time as the agency made its final determination, includ-

ing the determination of the award, if any. *Delpit v. Department of Energy*, Slip. Op. 89-0982 (D.D.C., Sporkin, J.) at 2-3. Completion of the administrative proceeding, on the nonconstitutional issues, was required in that case—and is required in this case—before consideration of the constitutional question, because when the administrative process has been completed, there may be no constitutional question to determine.

Clearly, this is a case which will not be appropriate for judicial review until the administrative process has been exhausted. If the agency finds that TCC directly violated the statute, the constitutional question is rendered moot. Similarly, if TCC is ultimately held not liable by the agency, the constitutional question disppears. TCC will not be harmed by the application of the exhaustion requirement, since judicial review is not foreclosed. As the court noted in *TICOR Title Insurance Co. v. F.T.C.*, 814 F.2d 731, 738 (D.C. Cir. 1987), "absent serious and irremediable injury, a court should be 'loath to interfere' with ongoing administrative proceedings, even where plaintiffs challenge the very constitutionality of those proceedings." (Qouting *Hastings*, 770 F.2d. at 1102).

This Court does not place much weight on plaintiff's argument that it should not be forced to participate in an allegedly unconstitutional administrative proceeding. The *TICOR* court rejected that argument. In that case, plaintiff attacked the Federal Trade Commission's authority to initiate and prosecute persons suspected of engaging in unfair methods of competition. Plaintiff argued, as does TCC, that exhaustion should not be applied where the constitutional challenge goes to the very authority of the agency to conduct the proceedings, especially where, as here, the agency cannot pass on the constitutionality of its own proceedings, and the exact nature of its law enforcement powers are well-known and need not be clarified. The *TICOR* court noted the "exhaustion doctrine . . . . retains its validity even when the

collateral judicial action challenges the constitutionality of the basic statute under which the agency functions." *Id.* at 739, citing *Rosenthal & Co. v. Bagley*, 581 F.2d 1258, 1260 (7th Cir. 1978).

Avoiding the needless decision of a constitutional question and refraining from frequent disruptions of administrative proceedings militate in favor of applying the exhaustion doctrine. *Id.* at 740. Thus, only where the constitutional violation is clear and unambiguous, or the resulting injury irreparable, will the court recognize an exception to the doctrine of exhaustion. *Id.* No exception applies in the case currently before this Court. It is certainly not clear that the agency's actions amount to a constitutional violation. Even plaintiff has admitted that there is a valid disagreement concerning the constitutional issues. There are also legitimate nonconstitutional issues present in TCC's case. The issue of a constitutional violation may never eevn arise, given that plaintiff's claims can possibly be disposed of on nonconstitutional grounds.

Plaintiff will suffer little if any harm by proceeding administratively. Review by TECA of any constitutional issues TCC has presented is not foreclosed but merely delayed. Because no compelling reason exists in the instant case to apply an exception to the exhaustion rule, this Court finds that TCC must exhaust its administrative remedies. Accordingly, this case will be dismissed.

An Order accompanies this Opinion.

DATE 1/14/91

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

---

Civil Action No. 90-1909
(Stanley Sporkin)

THE CRUDE COMPANY,
*Plaintiff,*

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*,
*Defendant.*

---

ORDER

[Filed Jan. 14, 1991]

Upon consideration of defendant's motion to dismiss, plaintiff's opposition thereto, oral argument, and the entire record in this case, it is hereby

ORDERED, that defendant's motion is GRANTED; and it is further

ORDERED, that the above-captioned case is DISMISSED.

DATE 1/14/91

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Judge

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

---

No. DC-115

THE CRUDE COMPANY,
*Plaintiff/Appellant,*

v.

U.S. DEPARTMENT OF ENERGY, *et al.*,
*Defendants/Appellees.*

---

Before: CHRISTENSEN, DAUGHERTY and BROWN, Judges.

ORDER

Upon consideration of appellant's petition for rehearing and suggestion for rehearing *en banc*, it is

ORDERED that said petition for rehearing is DENIED.

It is FURTHER ORDERED that the suggestion for rehearing *en banc* is DENIED. The court's mandate shall issue seven days from the date of this order—Tuesday, August 27, 1991.

FOR THE COURT:

/s/ Cynthia A. Dykes
CYNTHIA A. DYKES
Clerk

August 20, 1991